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No. 93-1897

In The

Supreme Court of the United States

October Term, 1994

SANFORD J. BERGER,

Petitioner,

vs.

CITY OF CLEVELAND,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Ohio

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a party not charged with the violation of an ordinance can challenge that ordinance on the basis of a constitutional challenge, absent any case or controversy involving the particular ordinance.

2. Whether a consensual search, wherein consent was obtained from the occupier of the premises, followed by a charge resulting in a hearing, with notice and an opportunity to be heard, violates the U.S. Constitution, when Petitioner has adequate opportunity but is simply unhappy with the result even though the courts properly exercised their discretion in limiting the time in which an appeal could be filed and in denying a discretionary motion to file a reply brief.

3. Whether the owner of private rental property can claim federal immunity or federal preemption on the basis that some of the payments he receives from his private tenants are federally subsidized, thereby permitting him to claim that he can not be prosecuted under the applicable housing code, in spite of HUD regulations requiring compliance with the local codes.

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STATEMENT OF THE FACTS

This case involves the inspection of a privately owned, Section 8 subsidized apartment building and the subsequent criminal citation issued by the City of Cleveland under its local code to the owner. Responding to a complaint called in by a tenant on the property, Housing Inspector Harriett Thomas reviewed the building located at 616 East 140th Street, Cleveland Ohio, on or about June 18, 1991. After inspecting the exterior of the building, Thomas noted several exterior maintenance violations. Thomas then attempted to gain access to the interior to complete her inspection.

The Inspector approached several residents sitting outside the property and asked to speak with the custodian, or a responsible party. A man came out from inside the property, asked the Inspector if he could help her, and explained he was the on-site custodian and caretaker responsible for maintaining the property. After presenting her credentials, Thomas requested access to the interior of the structure. The custodian provided Ms. Thomas entry into the structure and then accompanied her on the inspection.

Thomas found both interior and exterior violations on the property and wrote out a warning tag on June 18, 1991. The Inspector had previously run a title search, and found Petitioner, Sanford Berger, listed as the owner. After issuing the warning tag, the Inspector received a phone call from Mr. Berger. During the discussion, the two spoke at length about the housing violations on the property and what steps Mr. Berger needed to take to correct the problems.

On July 23, 1991, Inspector Thomas returned to the building to perform a follow-up inspection. Violations remained on the property, including some specifically noted on the warning tag. The Inspector issued a ticket citing the owner with violating Sections 369.13 and 369.15 of the Cleveland Codified Ordinances, (hereinafter C.C.O.) specifically stating that the gutters and downspouts leaked, the facia board was deteriorated, the wood trim needed paint and that the door locks to apartment No. 9 needed repair.

Petitioner was charged with violating C.C.O. §369.13, "General Maintenance Requirements" and §369.15, "Maintenance of Exterior Walls and Roof." Petitioner was given an arraignment date of August 30, 1991, appeared at arraignment and pled not guilty. Following a series of continuances, a trial was held on December 19, 1991. Before trial, the court heard argument on Petitioner's Motions to Suppress and Dismiss, both of which were overruled.

Following a bench trial in Cleveland Municipal Court, Petitioner was found guilty of the violations listed on the ticket, and fined $50.00 and costs. Petitioner appealed this decision to the Eighth District Court of Appeals, which upheld the trial court's decision. Petitioner then filed for review by the Ohio Supreme Court, which denied jurisdiction on March 2, 1994.

REASONS FOR DENYING THE WRIT
BRIEF SUMMARY

Petitioner's request for review by this Court is fundamentally flawed, raises no new federal questions, and should not be entertained by this Court. First, Petitioner lacks standing to challenge the ordinances that are the subject of his claim, since he was never charged under any of these ordinances. Further, Petitioner has not provided any basis for review by this Court since he has failed to show an actual injury to himself that is likely to be redressed, by the review of these inapplicable ordinances.

Next, as the record indicates and as determined by the courts below, Petitioner received both notice and hearing in this case, and received all necessary opportunity to be heard on these issues. His complaint regards the ruling on a motion to permit a reply brief and the time period in which his appeal was to be brought. Underlying all of this is the unavoidable conclusion that the Petitioner had notice and an opportunity to be heard on his claim, but is simply unhappy with the results and feels that he must have some additional process due him to rectify this unhappy situation.

Additionally, Petitioner raises issues regarding the search of the apartment building he personally and privately owns. Some of the tenants provide payment to him of rent under the federal subsidy program known as Section 8. The evidence before the Court clearly indicates that proper consent was given for the inspection of the premises by the custodian and one of the tenants.

Finally, the federal rent subsidies which Petitioner receives through his participation in the Section 8 Program are simply part of a payment program, and in no way provide Petitioner a legitimate basis for claiming federal official or federal contractor immunity from the enforcement of local building codes. Petitioner is not precluded from leasing to non-Section 8 tenants, and the Housing Inspector has no knowledge of whether a tenant is or is not a Section 8 participant. The inspector simply responds to complaints about unsafe and hazardous conditions in residential buildings. Petitioner is required to comply with local codes in order to continue receiving payments, and these local codes naturally include the housing codes.

Petitioner's petition supports no colorable claim to a constitutional deprivation and the record itself, as evidenced by the Court of Appeals decision, is filled with evidence of a consensual search, a proper notice of housing code violations, and an opportunity to be heard on these violations. Petitioner's dismay with the result of the exercise of his constitutional rights does not give rise to additional constitutional rights. Thus, the petition should be denied and these state court and local housing court issues should remain as decided by the state court and local administrative process.

1. PETITIONER DOES NOT HAVE STANDING TO CHALLENGE THE CONSTITUTIONALITY OF §367.03 OF THE CLEVELAND HOUSING CODE SINCE HE WAS NEVER CHARGED UNDER THIS ORDINANCE AND HAS FAILED TO SHOW THAT HE WAS INJURED BY THE APPLICATION OF THIS ORDINANCE.

Fundamental to every appeal is the establishment of the Court's jurisdiction to hear the issues presented, and standing must be established before jurisdiction attaches. The threefold test to establish standing requires that the plaintiff show a distinct and palpable injury to himself; that this injury is caused by the challenged activity; and that this injury is apt to be redressed by a remedy that the court is prepared to give. See *Boating Industry Association v. Marshall*, 601 F.2d 1376 (9th Cir. 1979). Capsulizing the standing requirement derived from a series of Supreme Court precedents, the Court in *Marshall* states, "Standing requires that the injury of which the plaintiff complains derives from the action challenged." Here, Petitioner fails to meet this requirement.

In *Lujan v. Defenders of Wildlife*, ___ U.S. ___, 112 S.Ct. 2130 (1992) this Court determined that petitioners did not have standing to challenge a rule by the Secretary of the Interior regarding federal projects. In *Lujan* this Court states that, "the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, * * * and (b) actual or imminent, not 'conjectural' or 'hypothetical.' " *Id.* at 2136. In that case, this Court found that petitioners failed to established actual or imminent injury to their members. This Court explains that establishing standing "depends

considerably upon whether the plaintiff is himself an object of the action at issue." *Id.* at 2137.

Here, Petitioner is attempting to attack the constitutionality of an ordinance where he has no direct interest and where the enforcement of the ordinance does not affect his rights. Petitioner was charged with violating C.C.O. §369.13 and 369.15, regarding exterior building maintenance. Petitioner was not charged with violating §367.03, which he now attempts to challenge. The inspector's exterior inspection was not based upon the authority of §367.03, which permits the City to enter and inspect properties. Petitioner provides no evidence that the inspectors used C.C.O. §367.03 to compel entry into the building. To the contrary, the record makes clear that the Inspector was escorted through the common areas of the building by the custodian and was invited into apartment No. 9 by the tenant. (Tr. at 16). Petitioner cannot attack the constitutionality of C.C.O. §367.03 because he was not charged with a violation of that provision and therefore he could not have been injured by it. *Id.*

Under the holdings in *Marshall* and *Lujan*, Petitioner has no standing to challenge the constitutionality of C.C.O. §367.03. Therefore Petitioner's first reason for granting certiorari is without merit, and provides no basis on which this Court could or should accept jurisdiction.

2. THE VOLUNTARY CONSENT TO A WARRANTLESS SEARCH OF PETITIONER'S PREMISES WAS CONSTITUTIONALLY PERMISSIBLE FROM THE TOTALITY OF THE CIRCUMSTANCES.

Consent searches are a recognized exception to the constitutional requirement that warrants be obtained for a search of a property. *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973). A warrantless search based upon consent is valid if consent to the search is voluntarily given. *Id.* Voluntariness is a question of fact to be determined from a totality of all the circumstances. *Id.* at 227.

The lower court's dissenting opinion, incorporated by Petitioner as the argument for his second basis for granting the writ, cites *Camara v. Municipal Court,* 387 U.S. 523 (1967). *Camara* involved a San F-ncisco Housing Code section which imposed criminal penalties for failing to allow warrantless inspections of residences. *Id.* at 527. This court held that administrative searches are significant intrusions upon the Fourth Amendment and are subject to the warrant requirement. *Id.* at 534.

In *Camara* this Court recognized two traditional exceptions to the warrant requirement: emergency situations and consensual searches. *Id.* at 539. Thus, under the *Camara* court's reasoning, even if Cleveland's ordinances were held to be unconstitutional, a search pursuant to voluntary consent would remain valid. *Id.* Petitioner relies upon the dissent's erroneous conclusion that the consensual search exception was taken away from municipal inspection programs by the Supreme Court of Ohio in *Wilson v. City of Cincinnati,* 46 Ohio St.2d 138, 346 N.E.2d 666 (1976).

In *Wilson,* the City of Cincinnati enacted ordinances requiring sellers of homes to tender prospective buyers a Certificate of Housing Inspection. *Id.* at 138, 346 N.E.2d at 667-668. To obtain this certificate, homeowners were compelled to allow an inspector to enter his or her home. *Id.* at 140, 346 N.E.2d at 668. Failure to tender a Certificate of Housing Inspection at the time of sale would subject the homeowner to criminal penalties. *Id.* Wilson and the Cincinnati Board of Realtors filed a declaratory judgment action asserting that the ordinances were unconstitutional. *Id.* The *Wilson* court held that "the coercion represented by the sole alternative of possible criminal prosecution clearly negates any 'consent' which may be inferred from the allowance of the inspection and, therefore, the validity of such searches upon the basis of consent is not sustainable." *Id.*

Three important factors distinguish *Wilson* from the present situation. First, *Wilson* was an action brought specifically to determine the constitutionality of Cincinnati's warrantless inspection ordinance. Here the constitutionality of the City's ordinance was challenged as a defense to a criminal action based on an external inspection and an internal consensual inspection. Voluntariness of consent to an interior inspection is to be determined from a totality of the circumstances. *Schneckloth.* C.C.O. §367.03 is merely one of the circumstances properly considered by the court in an evaluation of valid consent.

Second, *Wilson* was an action for declaratory judgment. The court did not examine whether a particular individual's consent was voluntary under a "totality of all the circumstances." *Schneckloth,* 412 U.S., at 227. Under a "totality of the circumstances" analysis defined by this

Court in *Schneckloth,* the potential effect of C.C.O. §367.03 is only one of the factors for the Court to consider in determining the validity of the consent to search.

A third distinguishing factor is that the applicability of the court's analysis in *Wilson* presumes actual knowledge of the ordinance making non-consent to a search a criminal offense. *Wilson* at 143, 346 N.E.2d at 670. The court held that knowledge of the ordinance, and the potential criminal penalty, created a dilemma for the homeowner of either allowing the warrantless inspection or facing criminal penalties. *Id.* This analysis is not applicable in the present situation. Petitioner has presented absolutely no evidence, nor even made a claim, that C.C.O. §367.03 had any effect upon the consent given by either the custodian or the tenant.

The evidence presented demonstrates that the internal inspection was based on valid consent. Thus, this Court should decline jurisdiction over this issue.

3. CONSENT TO SEARCH ONE UNIT AND THE COMMON AREAS OF A MULTI-UNIT APARTMENT BUILDING GIVEN BY BOTH THE ON-SITE CUSTODIAN AND A LAWFUL TENANT ON THE PROPERTY IS SUFFICIENT TO MAKE A WARRANTLESS CONSENSUAL SEARCH VALID.

In *United States v. Matlock,* 415 U.S. 164 (1974), this Court established that a third party exercising some common authority over a premises may consent to a search of that premises, and the evidence discovered during such a search is admissible. *Id.* In *Matlock* rental property was occupied by co-tenants, one of whom gave consent to the

search. The Court stated that "the consent of one who possesses common authority over premises or effects is valid as against the absent, non-consenting person with whom that authority is shared." *Id.* at 171, 94 S.Ct. at 993.

Citing *Matlock*, the Court in *United States v. Kelly*, 953 F.2d 562 (9th Cir. 1992), once again affirmed the admissibility of evidence obtained during a search consented to by a third party with common control. The court held that "consent to a search may be given by a third party who possesses common authority over, or other sufficient relationship to, the premises to be inspected." The court also clarified the boundaries of common authority; "the common authority justifying the consent need only rest on the mutual use of the property by persons having joint access or control for most purposes . . . " *Id.* at 566. Clearly in this case both the custodian and the tenant had "joint access or control for most purposes" under the meaning of the court in *Kelly*, and therefore their consent to an inspection by the City was valid, and the inspection lawful.

In *J.L. Foti Construction, Inc. v. Donovan*, 786 F.2d 714 (6th Cir. 1986), the Court held that evidence obtained by an OSHA inspector after a third party general contractor for a construction company consented to the inspection over the company owner's objection when the owner was present, was admissible. The Court stated that "a joint occupant assumes the risk of his co-occupant exposing their common private areas to a search . . . " and that the general contractor had "common authority" over the site and voluntarily consented to the inspection. In this case the inspector was given permission to enter by persons

with either direct authority over the portions of the premises inspected or general authority as a custodian to care for all common areas. (Tr. at 13, 14 and 16.)

Ohio law gives tenants control over the right of access to rental units and the right to exclude the landlord from the dwelling unit absent appropriate advanced notice of entry. Section 5321.04 Ohio Revised Code. The inspection of the door locks in unit number 9 in this case would not require a warrant since the inspection was directly requested by the tenant residing in the apartment. The inspector's reasonable belief that consent had been given by a person with authority over the property makes such warrantless inspection lawful. *White Fabricating Co. v. U.S.*, 903 F.2d 404 (6th Cir. 1990).

Petitioner has not provided the Court with any grounds for granting jurisdiction based upon his meritless claim that the City's inspection of his property constituted a non-consensual warrantless search, and Petitioner's request for review should be denied.

4. THE ENFORCEMENT OF THE CITY'S HOUSING CODES IN PETITIONER'S PRIVATELY OWNED BUILDING RECEIVING SECTION 8 SUBSIDIES WAS BOTH REQUIRED AND PERMITTED UNDER APPLICABLE FEDERAL REGULATIONS.

Federal regulations not only permit, but actually require, enforcement of local building, housing, health and safety codes against privately owned properties where the owners receive HUD Section 8 subsidies:

> (a) . . . The owner's responsibilities shall include, but not be limited to:

(1) Performance of all management and renting functions.

* * *

(3) Performance of all ordinary and extraordinary maintenance;

(b) Any owner may contract with any private or public entity to perform for a fee the services required by paragraph (a) of this section; Provided that such a contract shall not shift any of the owner's responsibilities or obligations.

24 CFR 882.117.

Chapter 5321. of the Ohio Revised Code (hereafter "O.R.C."), Ohio's Landlord-Tenant law, defines how an owner of rental property must perform management and rental functions in Ohio. O.R.C. Section 5321.04 "Obligations of Landlord" specifically sets forth what is required of an owner of rental property:

(A) A landlord who is a party to a rental agreement shall:

(1) Comply with the requirements of all applicable building, housing, health, and safety codes which materially affect health and safety;

(2) Make all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition;

* * *

Federal regulations require owners to perform all ordinary and extraordinary maintenance, while the standards for such maintenance are defined in O.R.C. 5321.

The federal requirement to perform ordinary and extraordinary maintenance indicates HUD's intention to require state and local regulation of all Section 8 buildings. The federal regulation of private housing in the Section 8 program indicates that HUD requires the owners to comply with local codes and intends local authorities to monitor and enforce compliance with these codes. They do not preempt local or state regulations. Therefore, Petitioner's Fourth Proposition of Law is without merit.

In an effort to support his federal preemption argument, Petitioner has cited *Goodyear Atomic Corporation v. Miller,* 485 U.S. 174 (1988), which involved the application of State safety requirements at a privately operated, federally owned nuclear facility. In *Goodyear,* this Court held that the Supremacy Clause did not bar Ohio from applying its additional-award provision to a private contractor operating a federally owned nuclear production facility. The Court explains that "Congress may reasonably determine that incidental regulatory pressure is acceptable * * * ". Additionally, in *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 253 (1983), this Court found that Congress was willing to accept the regulatory consequences of the application of state tort law to radiation hazards even though direct state regulation of safety aspects of nuclear energy was preempted.

Petitioner also cites *Gade v. National Solid Waste Management Ass'n,* ___ U.S. ___, 112 S.Ct. 2374 (1992) in support of his preemption argument. In *Gade,* this Court outlines three circumstances under which a preemption argument will succeed: Congress may, by the terms of a statute, preempt state law by explicitly stating that it is doing so; Congress may also preempt state law by using

language, which, although not explicitly preemptive of state law, signals a Congressional intent to completely occupy a field; and finally, federal law always preempts state law if the state law is in actual conflict with federal law.

In this case involving the application of local housing ordinances to a building receiving rent subsidies through HUD's Section 8 Program, Congress has not explicitly preempted state law, Congress has not signalled an intent to occupy the field, and there is no actual conflict with federal law.

In *United States Constructors and Consultants, Inc. v. Cuyahoga Metropolitan Housing Authority*, 35 Ohio App.2d 159, 300 N.E.2d 452 (Cuyahoga Co., 1973), the Eighth District Court of Appeals found that "(L)egislation permitting federal government to offer and provide federal assistance to state or local housing agencies to develop low-rent housing is not intended to limit or exclude state action or to exercise supremacy in that area." That case involved HUD's "Turnkey Program" and a Metropolitan Housing Authority's power to characterize the purchase of a newly constructed building as a contract for sale rather than a construction contract. With reference to 42 U.S.C.A. 1401 the court explains:

> Congress did not enact legislation exercising exclusive jurisdiction in regard to housing. The federal legislation merely sets forth a national housing policy, to promote the general welfare of the nation by employing its funds and credit to assist the states and their political subdivisions in eliminating unsafe and unsanitary housing conditions and the acute shortage of

> decent, safe and sanitary dwellings for families of low-income in urban areas. . . . it is clear from reading 42 U.S.C.A. 1401 to 1436 that Congress did not intend to limit or exclude state action or to exercise supremacy in this area.

In this case, Section 8 is designed to foster a federal policy by subsidizing low and moderate income rental property, and it does not signal an intent to preempt housing and building code enforcement. Given the abundance of clear language authorizing state and local authority in this area, and Petitioner's failure to cite any language explicitly preempting enforcement of local codes, he cannot prevail under this theory.

Congress has not signaled any intent to completely occupy the field of housing code enforcement in the arena of federally subsidized rent for privately owned housing. Federal regulations require that families entering privately owned housing subsidized by Section 8 be given information on the applicable State and local laws which set standards and requirements for the quality of the homes. See 24 CFR 882.209(c). Under State and local codes, landlords are required to comply with local housing codes. See O.R.C. 5321.04 and C.C.O. §361.02-.03. If it was Congress' intent to fully occupy the field of housing code enforcement, there would be no need to alert participating families to the applicability and enforceability of these laws.

Notably, there are no enforcement provisions authorizing the federal government to prosecute owners of substandard dwellings. The federal government's only recourse is to void the owners' eligibility to participate in the program and terminate the contract between the

owner and the government. 24 CFR 882.209. Had there been an intent to fully occupy the field of monitoring and enforcing housing standards, the federal regulations would certainly have given its Public Housing Authority (PHA) the power to inspect, cite, prosecute and penalize owners in violation of these standards.

Wisely, the housing quality standards set forth in the federal regulations are flexible, allowing for variations based on such regional specifics as climate, geographical conditions and *local codes*. 24 CFR 882.109. This flexibility is consistent with the overall intent to provide more than just a roof over people's heads, and to ensure affordable, habitable housing to low and moderate income people. Enforcement of local minimum standards helps provide housing that meets this country's definition of decent, safe and sanitary housing.

Compliance with the local Housing Code is required under the federal regulations and is not in conflict with federal law. The Petitioner was cited under C.C.O. §§369.13 and 369.15 for failure to maintain exterior walls and roof, and failure to generally maintain the premises. Federal regulations require the owner to perform "all ordinary and extraordinary maintenance" and "all management and renting functions." 24 CFR 882.109 (f)(1) and 882.117. There is no conflict between these requirements and those in the City's Housing Code. Petitioner's argument for preemption once again falls short.

Petitioner cites a series of cases in a futile attempt to demonstrate federal preemption of state and local authority to enforce housing and building codes in Section 8

housing. Defendant cites one case involving F.C.C. regulation of cable television, and one case involving regulation of federal savings and loans. While Petitioner may have properly characterized the holdings in these cases, they are inapplicable to this case. First, in *Capital Citizens Cable v. F.C.C.*, 486 U.S. 57 (1984), this Court found that the F.C.C. intended to preempt state and local regulation by absolutely occupying the field, and that Congress authorized the F.C.C. to federally preempt local regulation under the enabling legislation. Similarly, in *Fidelity Federal Savings and Loan Association v. De La Cuesta*, 458 U.S. 141 (1982), this Court held that Congress had empowered the Federal Home Loan Bank Board to absolutely occupy the field of regulating federal savings and loan associations, and preempt state regulation. However, absent intent or Congressional authorization to preempt, the mere creation of a federal agency and authorization to promulgate regulations does not create federal preemption.

Petitioner also cites *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187 (1956). That case involved a municipality's authority to require local licenses of construction workers hired for jobs on federally owned property. In this case, Petitioner's building is not federally-owned or federally-controlled property. Municipalities are not only authorized, but are charged with enforcing local housing codes against privately owned property. Petitioner's reliance on these cases to establish his federal preemption argument is, at best, misplaced.

The Petitioner has not demonstrated any of the circumstances under which this court could determine that federal law has preempted local law. Petitioner's fourth

reason for granting jurisdiction is wholly unfounded and this Court should deny jurisdiction.

5. AS OWNER OF PRIVATE PROPERTY RECEIVING FEDERAL RENT SUBSIDIES UNDER SECTION 8, PETITIONER IS NEITHER A FEDERAL OFFICIAL NOR A FEDERAL CONTRACTOR, AND CANNOT CLAIM IMMUNITY FROM CRIMINAL PROSECUTION FOR VIOLATIONS OF THE MUNICIPAL HOUSING CODES.

Petitioner has attempted to argue that he is clothed with governmental immunity because he is performing a governmental function. In doing so, he has misconstrued the cases that he has cited to this Court and has attempted to argue that his role as a private landlord accepting rental subsidies from the federal government puts him in the place of one performing a governmental function.

The record is void of any evidence that Petitioner is anything more than a landlord collecting rents. He does not administer a government program, does not represent a governmental agency and does not provide any traditional governmental services. The City's criminal action was brought to enforce the City's Housing Code. It was not brought against him to challenge any governmental classification, regulation or action. In fact, as described in the City's argument to reason No. 4, above, Petitioner is required to comply with municipal housing codes by the federal regulations governing Section 8 housing. Petitioner's actions in violation of the City's Housing Code are not pursuant to any federal statutory scheme but rather are in direct conflict with it.

The cases cited by Petitioner are not applicable to the facts presented in this case. In *Buckley v. Fitzsimmons*, 509 U.S. ___, 113 S.Ct. 2606 (1993), the issue decided by this Court is whether prosecutors can claim absolute or qualified governmental immunity following charges of malicious prosecution pursuant to investigation and indictment of a suspect on a murder charge. Citing *Forrester v. White*, 484 U.S. 219, 229 (1988), this Court held that in deciding the level of immunity to afford, courts must "look to the nature of the function performed, not the identity of the actor who performed it." *Id.* at 2607. Clearly under this test, Petitioner's function is that of a private landlord, receiving rent subsidies from the federal government. He does not act on behalf of the government, or in any governmental capacity.

Attempting to support his allegation that receipt of federal Section 8 subsidies qualifies him as a governmental official or federal contractor and affords him immunity from prosecution, Petitioner cites to *Gorsuch Homes, Inc. v. Wooten*, 73 Ohio App.3d 426, 597 N.E.2d 554 (Clark Co., 1992). Petitioner not only misstates the holding in that case, but fails to demonstrate how it supports his claim of governmental immunity for private landlords who provide Section 8 housing.

Unlike this case, *Gorsuch* involves an appeal from an eviction action by a Section 8 tenant. In finding that the landlord had failed to provide his tenant with the pre-eviction hearing required under both 24 CFR 880.607(c) and his agreement with HUD, the Court simply stated that:

> The due process requirements of the Fourteenth Amendment apply to private landlords who provide Section 8 federally subsidized housing for low income tenants. . . . A landlord cannot evict a tenant in Section 8 housing absent "good cause"; absent good cause for eviction, a tenant may remain in the housing for life, and the right to do so is a constitutionally protected interest.

Id. 73 Ohio App.3d, at 433.

The court explains that "[o]ne of the purposes of federally subsidized housing is to assure that every American can afford a decent home. The purpose of the requirement of the federal regulations and the lease agreement that a tenant must be afforded an opportunity to meet with the landlord to discuss a proposed termination of tenancy is to attempt to resolve the controversy in a mutually satisfactory manner, that will, if possible, avoid the tenant's loss of subsidized housing while protecting the rights of the landlord." *Id.* at 434.

Petitioner's fifth reason for granting certiorari is without merit, and this Court should decline jurisdiction over this issue.

6. PETITIONER DOES NOT HAVE A LIBERTY INTEREST IN C.C.O. §367.04 AS THE PROCEDURE DEFINED THEREIN WAS NOT UTILIZED IN THIS CASE AND PETITIONER WAS GIVEN SUFFICIENT NOTICE OF THE VIOLATIONS OF WHICH HE WAS CHARGED AND CONVICTED.

Petitioner's argument is erroneously based on the premise that, when filing charges against him, the City was required to follow the procedures set forth in C.C.O.

§367.04. C.C.O. §367.99(e) provides an alternative method by which an owner of residential housing can be charged with a violation of the City's Housing Code. As a result of this factual mistake, Petitioner argues incorrectly that he has a liberty interest in the procedure set forth in §367.04.

C.C.O. Chapter 367 provides two methods by which the City's Commissioner of Building and Housing can bring charges of violations of the Housing Code against owners of residential property. The first procedure, set forth in C.C.O. §§367.04 and 367.05, includes the issuance of Notices of Violations, and, following non-compliance, the issuance of a summons and complaint.

The second method of bringing these charges against owners of residential property is the issuance of a ticket. This procedure is contained in C.C.O. §367.99(e), which provides, in part:

> *In addition to any other method of enforcement provided in this chapter,* the above listed minor misdemeanors may be enforced by the issuance of a citation in compliance with Rule 4.1 of the Ohio Rules of Criminal Procedure.

(Emphasis added).

Ohio Rule of Criminal Procedure 4.1(c) provides that:

> In minor misdemeanor cases a law enforcement officer may issue a citation. The citation shall: contain the name and address of the defendant; describe the offense charged; give the numerical designation of the applicable statute or ordinance; state the name of the law enforcement officer who issued the citation; and order the defendant to appear at a stated time.

As the record shows, Petitioner was issued a ticket pursuant to C.C.O. §367.99(e) and Ohio Rules of Criminal Procedure 4.1(c). Criminal action was not brought pursuant to §367.04. Section 367.99(e) provides that the ticketing procedure is an alternative to the procedures contained in §§367.04 and 367.05. The City chose to issue a ticket, and was not required to give the Petitioner any prior notice of violation. Accordingly, the Petitioner's argument is founded on a faulty premise and is therefore without merit.

In support of his argument that he is entitled to notice of violation prior to citation under Rule 4.1, Petitioner cites in *Perry v. Sinderman*, 409 U.S. 593 (1972). *Perry* is factually distinguishable from, and legally inapplicable to, the present case. In *Perry*, the issue was whether a state college professor had a right to re-employment based upon the college's "de facto" tenure policy arising from officially promulgated rules and understandings, entitling him to a hearing on his claim to job tenure. *Id.* at 593. In reaching its decision that the respondent was entitled to the chance to prove the legitimacy of his claim, the Court looked at the rules and understandings promulgated by the college.

Even if the City had used the procedures contained in C.C.O. §§367.04 and 367.05, the Petitioner received sufficient notice from the City. The Court of Appeals stated that its "review of the record shows that Berger was notified of the violations he was convicted of." *City of Cleveland v. Sanford J. Berger*, Court of Appeals, Eighth District, No. 63089, September 30, 1993, at page 11. Appendix to Petitioner's Brief, hereafter "Appendix", page A11. The Inspector issued Berger both a warning

notice and spoke with him on the telephone about the violations. Appendix, page A13.

Accordingly, the Petitioner does not have any liberty interests in C.C.O. §367.04 because the City did not utilize this Ordinance in charging the Petitioner and even if he had been charged through §367.04, he was given sufficient notice of the violations.

7. PETITIONER WAS NOT DENIED DUE PROCESS OF LAW BY THE COURT OF APPEALS' REFUSAL TO PERMIT PETITIONER TO FILE A REPLY BRIEF.

Petitioner's right of due process of law was not violated by the Court of Appeals' refusal to permit him to file a reply brief. Petitioner attempts to structure his argument to imply that he was surprised by a "new issue" raised by the City (that is, third-party consent to the search of his apartment building), thereby depriving him of a "basic concept of fundamental fairness." To the contrary, the City did not raise a new issue at the Court of Appeals but simply responded to the Petitioner's arguments as set forth in his motions at the trial level regarding the constitutionality of the search. Petitioner was not denied due process of law and this Court should decline to grant the writ on this basis, as well.

First, the City raised the third-party consent argument as a response to the Petitioner's trial motions claiming that the search was unconstitutional. The Petitioner was fully aware of the facts of the search. The Petitioner should not have been surprised that the City would

respond to his allegations of unconstitutionality by explaining the reason that the search was constitutional.

Second, Petitioner has failed to cite any law which supports his argument. Petitioner cites cases which are based on the failure to inform defendants of charges or penalties in criminal cases. For example, in *Lankford v. Idaho*, 501 U.S. ___, 111 S.Ct. 1723 (1991), the issue presented was whether the court's failure to inform the defendant that it was considering the death penalty was a violation of the defendant's right to due process. *Id.* at 1725. Petitioner fails to cite any case wherein a Court found that the failure to permit the filing of a reply brief is a violation of anyone's right to due process.

Finally, as this Court will see from the other arguments of Petitioner in his Petition for a Writ of Certiorari, even if it was error for the Court of Appeals to deny Petitioner the ability to file a Reply Brief it would be harmless error, as there is no legal or factual basis for his arguments. Petitioner was not harmed by the Court of Appeals' decision. Therefore this Court should deny jurisdiction of this issue.

8. C.C.O. §367.04(a) DOES NOT CONSTITUTE AN IMPROPER DELEGATION OF A CITY'S LEGISLATIVE FUNCTION IN VIOLATION OF THE FOURTEENTH AMENDMENT.

As previously set forth, the City did not charge Petitioner utilizing the procedures set forth in C.C.O. §367.04. Therefore, Petitioner does not have standing to attack the constitutionality of C.C.O. §367.04. However, even

assuming that the Petitioner did have standing to question the constitutionality of C.C.O. §367.04, that section is constitutional.

Appellant attacks the constitutionality of C.C.O. §367.04 by arguing that the Commissioner of Building and Housing is given too much discretion to determine the time given to a property owner to comply with the Housing Code. He alleges that §367.04 permits the arbitrary and discriminatory exercise of authority in violation of the due process clause of the Fourteenth Amendment of the U.S. Constitution and Article I, Section 16 of the Ohio Constitution.

The only case cited by Appellant in support of his argument is *Brookpark Entertainment, Inc. v. Taft*, 951 F.2d 710 (6th Cir. 1991). The *Brookpark* decision is factually distinguishable from, and legally inapplicable to, the present case. In *Brookpark*, the statute at issue permitted the revocation by referendum of a liquor license of any establishment found to have violated the liquor laws by the Ohio Department of Liquor Control. *Id.* at 712. In reaching its decision that the law on its face violated due process, the Court found it important that the voters could select an establishment with one minor violation for a revocation referendum, while ignoring an establishment which had multiple serious violations. *Id.* at 716-17. There was no accountability, it is impossible to look at the reasoning behind the vote in a referendum. *Id.* at 716. As the Sixth Circuit Court of Appeals stated, "(t)he fundamental problem with the Ohio . . . law is the arbitrariness inherent in a referendum". *Id.*

The problems inherent in the statute at issue in the *Brookpark* case are not present in C.C.O. §367.04. First, C.C.O. §367.04 does not deal with the inherent arbitrariness of a referendum. The Commissioner of Building and Housing, and her agents, the Housing Inspectors, not the voters, make the decisions under C.C.O. §367.04. The length of time permitted a residential property owner to repair violations of the Housing Code must be reasonable, as stated in the Ordinance. These decisions can, and often must be, defended by the Commissioner of Building and Housing. As opposed to a referendum, it is quite possible to look at the reasoning behind these decisions.

Second, unlike the referendum process in Brookpark, the owner of residential property cited under C.C.O. §367.04 can appeal the notification, including the time given for repairs, to the Board of Building Standards. C.C.O. §367.09. The filing of an appeal acts as a stay on the enforcement of such notice until the appeal is acted on by the Board. *Id.*

Third, Petitioner ignores the reality of the situation confronting the Commissioner of Building and Housing in attempting to enforce the City's Housing Code. The Housing Inspectors are confronted with an unlimited number of variations of violations of the Housing Code which demands flexibility in establishing repair deadlines. A predetermined, rigid time matrix which would cover each possible combination of Housing Code violations would be impossible to create. As the Court of Appeals stated in its opinion "(s)ome code violations may be more extensive than others, requiring more time to complete repairs. The vast number of different violations

necessitates that the time for repair be established on a case-by-case basis." Appendix, pages A10-A11.

Accordingly, for the foregoing reasons, Petitioner lacks standing to raise the constitutionality of C.C.O. §367.04 and said Ordinance is constitutional. Therefore, this Court should deny Petitioner's request that this Court accept jurisdiction over this issue.

9. A LOCAL ORDINANCE WHICH REASONABLY LIMITS THE TIME FOR FILING AN APPEAL DOES NOT VIOLATE DUE PROCESS.

A local ordinance that limits the time for filing an administrative appeal does not violate Petitioner's due process rights. C.C.O. §367.09 states:

> The owner . . . of any dwelling structure shall have the right to appeal from any notice issued by the Commissioner of Housing within the time specified in such notice for compliance therewith. . . .

As the Eighth District Court of Appeals for Cuyahoga County noted in their opinion below rejecting Petitioner's argument, the statute provides that a property owner may appeal a ticket "within the time allowed for compliance." As the court pointed out, although the owner must still appear at his arraignment, action to enforce the ticket is suspended during pendency of the appeal. Petitioner had the right to appeal the ticket and could have delayed its enforcement by filing a timely appeal.

Petitioner cites several cases in an attempt to argue that his right to due process was somehow abridged by the City's ordinances. Petitioner cites *Flatford v. City of*

Monroe, 17 F.3d 162, 169 (6th Cir. 1994), and *Armstrong v. Manzo*, 380 U.S. 545 (1965), both of which involve governmental action without any available appeals process. The issue in *Flatford* was the emergency eviction of tenants, who had no means of appealing the eviction. *Armstrong* dealt with an adoption without any prior notification to the natural father of a scheduled hearing. These cases are factually dissimilar and legally inapplicable in this case.

Here, Petitioner had a meaningful opportunity to respond at a meaningful time, but failed to avail himself of this opportunity. Petitioner spoke with the Inspector shortly after the warning tag was issued, could have protested the notice and requested a hearing before an administrative board to appeal the violations listed on the warning tag. Instead, Petitioner stated that he understood that violations existed in his building, and agreed to correct these violations during his phone conversation with the Inspector.

Petitioner simply failed to timely file an appeal pursuant to the City's clearly established appeals procedure, and should not now be permitted to claim violation of his right to due process based upon this failure. Petitioner's final basis for requesting review by this Court is without merit, and this Court should deny jurisdiction.

CONCLUSION

Wherefore, the Respondent City of Cleveland requests that this Court deny the petition for the issuance of a writ of certiorari as Petitioner does not have standing to raise the challenges he has attempted to raise, Petitioner has received all of the process which is due him, including notice and the opportunity to be heard, and Petitioner cannot hide under federal immunity or federal preemption simply because he, as the owner of private rental property, has agreed to accept federal monies as rental payments. He is still required to comply with the applicable codes to this contractual arrangement, including the local housing code.

Respectfully submitted,

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